SUPREME COURT U.S.
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NO. 90-563

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

KATHLEEN R. SWAN and WILLIAM O. SWAN,

Petitioners,

v.

THE STATE OF WASHINGTON,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF WASHINGTON

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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December 21, 1990

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I. RESPONSE TO RESPONDENT'S STATEMENT OF CASE

A. The Respondent Makes Several Misleading Factual Representations.

In its brief,[1] Respondent presents several factual assertions which are not borne out by the record. First, Respondent alleges that Lisa Conradi (the daycare worker who first heard the allegation of abuse) had no suspicions that Beth Anne had been abused prior to meeting her. To the contrary, Cindy Bratvold, the daycare owner, testified that on October 1, 1985[2] she told Conradi that she had a concern that Beth Anne was sexually abused.[3] (RP

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[1]Respondent's Brief in Opposition to Petition for Certiorari (hereinafter referred to as "Respondent's Brief").

[2]This was Conradi's first day on the job. One day later, October 2, 1985, Conradi met Beth Anne and obtained the statements which form the basis of this prosecution.

[3]Bratvold's prior suspicions of abuse were based upon Beth Anne's masturbatory behavior.

4/10/86, p. 48)[4] Furthermore, the record uncategorically shows that, at the time of her meeting with Beth Anne, Conradi was extremely predisposed to find sexual abuse. See Petition for Certiorari, p. 8.

Second, in an attempt to bolster the reliability of the admitted hearsay statements, Respondent stresses that the children both mentioned that a Josh or John played these "games" with the Swans and that a man named John had previously resided in the Swan house. Significantly, in their motion for a new trial the petitioners supplied an affidavit of a mother[5] whose son Josh attended the Bratvold's preschool with Beth Anne and Rachel and who had never been to the Swan

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[4]RP refers to the verbatim report of proceedings which is identified by the date and page number.

[5]Who only learned about the Swan case after hearing a news story on the TV news following the verdict.

house. Josh's mother stated that in late September of 1985 her son mentioned a birthday party and made a comment about "birthday candles up the butt."[6] She also clearly remembers that Josh had marbles and usually carried them with him, which was also relevant to Beth Anne and Rachel's many statements concerning marbles.

Third, the Respondent suggests that the children did not talk with each other prior to their separate interviews with the CPS case worker on October 4, 1985. This statement is false. Conradi was intimately involved with both children prior to the secondary interviews by the CPS worker. After the CPS worker unsuccessfully attempted to question both children together, Conradi met with both children for approximately ten minutes and discussed

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[6]This was the same as one of the allegations made by Rachel against the Swans.

4/10/86, p. 48)[4] Furthermore, the record uncategorically shows that, at the time of her meeting with Beth Anne, Conradi was extremely predisposed to find sexual abuse. See Petition for Certiorari, p. 8.

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II. RESPONSE TO ARGUMENT THAT CHILDREN'S HEARSAY STATEMENTS WERE RELIABLE.

A. Where a child is incompetent because of her inability to understand the obligation to speak the truth, her prior hearsay statements may not be deemed to have particularized guarantees of trustworthiness.

While the Respondent mentions that both children were incompetent, Respondent nevertheless argues that their statements are sufficiently reliable. As will be shown, the finding of incompetence mandates that Rachel's earlier hearsay statements do not bear particularized guarantees of trustworthiness and were therefore introduced in violation of the Sixth Amendment.

The following discussion from State v. Swan, 114 Wn.2d 613, 646, ___ P.2d ___ (1990) (Appendix B to Petition for Certiorari (hereinafter "App. B"), p. 66) is of great importance in demonstrating the

extent to which Rachel was unable to communicate truthfully:

> Turning to the competency hearing, R.T. [Rachel] said that her birthday was in "higher June." She also said she had been in the courtroom 40 times (she had never been there before) and it was Saturday, although it was not. When asked if she recognized anyone, she pointed to defense counsel and said she had seen him four days ago, which she had not. She did not say that she recognized her father[8] or the defendants, who were also in the courtroom. When the court asked R.T. if she knew the difference between the truth and a lie, R.T. said "not telling the truth" is a lie. The court then asked R.T. if it would be the truth or a lie if she said she was wearing a pink dress. Though her dress was pink, R.T. said it would be a lie because her dress was long. R.T. then said her dress was "blue, sort of, but it's pink."[9] The court excused R.T. and found her incompetent to testify on the basis she did not understand the obligation to tell the truth on

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[8]In fact, she did recognize her father and when asked to point him out, did so. RP 4/3/86, p. 214.

[9]Importantly, Rachel knew her colors. See p. 7, infra.

> the witness stand and because she did not have a sufficient memory to speak truly about past events.

Rachel's father, Jerry Thiel, also testified at the competency hearing. He stated that his daughter was a good communicator, had an extensive vocabulary, and knew her colors. He also stated that Rachel had no fear of going to court, ran and jumped in the prosecutor's arms before court, waved and grinned at the defense counsel, and seemed to be having fun. RP 4/3/86, pp. 382-383.

In Idaho v. Wright, 497 U.S. ___, 110 S.Ct. 3139, 111 L.Ed.2d 638, 658 (1990) this Court emphasized that the finding of incompetency of the child witness was not based upon the fact of the child's being incapable of receiving just impressions of the facts, but instead because ". . . the younger daughter was 'not capable of communicating to the jury.'"

Unlike Idaho v. Wright, where the trial court explicitly found the child "was capable of receiving just impressions of the facts and of relating them truly," id., here the finding of incompetency was based on the fact that Rachel could not receive or communicate facts truthfully. This was clearly borne out not only by her testimony at the competency hearing, but also by her prior misstatement to the investigating detective and the prosecutor that her

father put marbles in her bottom, and that she told this to Cindy Bratvold.[10]

Here Rachel's incompetency would have been every bit as prevalent at the time she made the hearsay statements in October of 1985 as it was at trial in April of 1986. Under these circumstances, a finding that her earlier statements had particularized guarantees of trustworthiness cannot be sustained. State v. Paster, 524 A.2d 587, 590 (R.I. 1987).

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[10]This is discussed in detail on pages 14-15 of the Petition for Certiorari. The Washington Supreme Court's only mention of Rachel's false report is tucked away in a footnote:

> We are not unaware that R.T. at one point evidently also told the police that "Jerry" -- her father -- put marbles in her bottom.

State v. Swan, supra, 114 Wn.2d 652, n. 59 (App. B, p. 79, note 59). The decision does not further discuss the implication of this, even in relation to the court's finding that Rachel had a good reputation for truthfulness and supposedly made prior consistent statements.

B. The criteria utilized by the Washington Court in judging the reliability of a child hearsay statement were totally inadequate.

The criteria utilized by the Washington Supreme Court to test the reliability of hearsay statements are totally inappropriate and inadequate when judging statements of child witnesses. These factors were derived from two cases, State v. Parris, 98 Wn.2d 140, 654 P.2d 77 (1982)[11] and Dutton v. Evans, 400 U.S. 74, 27 L.Ed.2d 213, 91 S.Ct. 210 (1970), neither of which involved child witnesses.

These factors are set forth at State v. Swan, 114 Wn.2d 613, 647-648 (Appendix B, pp. 70 - 71). An examination of these factors and the Washington Supreme Court's

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[11] State v. Parris involved the introduction of a hearsay statement made by an unavailable informant against a defendant in a heroin distribution prosecution which was held to qualify as a statement against penal interest pursuant to Washington Evidence Rule 804(b)(3) (which is identical to FRE 804(b)(3)).

analysis will demonstrate that the inquiry into the particularized guarantees of trustworthiness demanded by Idaho v. Wright did not occur. Rather than a focused examination of the relevant circumstances "that surround the making of the statement and that render the declarant particularly worthy of belief," Idaho v. Wright, 111 L.Ed.2d at 655, the Swan court combined the initial statements with the secondary and later statements (extending over an eight month period) and tested them as one. The Swan opinion contains a rambling and disjointed discussion of all the statements combined without making the necessary findings of particularized guarantees of trustworthiness with respect to each statement as required by the Sixth Amendment's Confrontation Clause.

For example, the Swan court relied heavily on the factor of whether the

witness had a motive to lie. While this certainly would be an issue with an informant in a drug case, such inquiry is irrelevant with regard to very young children. The real inquiry should be whether the child "was capable of receiving just impressions of the fact and of relating them truly." Idaho v. Wright, supra, at 111 L.Ed.2d 658. Another important factor, whether the statements were made spontaneously, should have favored the Petitioners, especially given Conradi's predisposition and Bratvold's intention to obtain a statement. It is suspicious that Beth Anne Swan, who had been at the Bratvold daycare for over two years, had never made any statements concerning child abuse until a few minutes after she first met Conradi. With regard to Rachel, it is also very suspect that the statements concerning abuse were made only

after Bratvold had been informed by Conradi of the allegation and Bratvold had indicated her intention to interrogate Rachel in order to determine whether such sexual abuse had occurred.

The Swan court also relied heavily upon the fact that there was supposedly cross-corroboration between the two children's statements. This Court has held that such cross-corroboration may not support a finding of particularized guarantees of trustworthiness. Idaho v. Wright, 111 L.Ed.2d at 659. Furthermore, under the particular facts of this case, where the interrogators knew the allegations and were attempting to have each child repeat the allegations in subsequent interviews, such "cross-corroboration" is meaningless, except insofar as to demonstrate the untrustworthiness of the statements.

In discussing the Dutton v. Evans factors, the Swan court explained that "it is doubtful whether cross-examination could have shown either child's lack of knowledge," because "B.A. was unable to speak, while R.T. could not respond appropriately to questions in a courtroom setting." 114 Wn.2d at 651, App. B., p. 77-78. The Swan court utilized circular reasoning in its conclusion that cross-examination could be dispensed with simply because the children were held to be incompetent. Clearly, this analysis conflicts with the Sixth Amendment and this Court's holding in Idaho v. Wright.

Interestingly, in applying these factors, the Washington Supreme Court stressed that both girls had reputations for truthfulness. It is inconceivable that the Washington court could have reached this finding, especially given Rachel's

false statements. With regard to the Washington court's discussion that both "girls made similar declarations on two consecutive days, without discussing the matter between themselves," (State v. Swan, 114 Wn.2d at 650 (Appendix B, p. 76), this neglects the fact that Bratvold, the interrogator of Rachel, knew what Beth Anne had said and was attempting to obtain disclosures, much like Dr. Jambura, the highly trained pediatrician in Idaho v. Wright, supra.

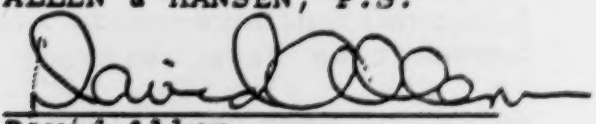
III. CONCLUSION

For all these reasons, the Washington court's findings that the statements were reliable does not satisfy the "particularized guarantees of truthfulness" test required for Sixth Amendment scrutiny, and the Petition for Certiorari should be granted.

DATED this 21st day of December, 1990.

Respectfully submitted,

ALLEN & HANSEN, P.S.



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